

The respondent's attorney also filed an Application For Hearing which listed Farm Credit Bank as the claimant's current employer. Respondent's attorney contended such filing was an appropriate method to implead the subsequent employer of the claimant. Farm Credit Bank's attorney appeared at the September 20, 2001, hearing and challenged the authority of respondent to implead a subsequent employer. The Administrative Law Judge's Order determined there was no basis to bring Farm Credit Bank into the matter and that finding was not appealed.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

An Administrative Law Judge's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the Administrative Law Judge exceeded his or her jurisdiction in granting the preliminary hearing benefits.¹ "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant's condition and present need for medical treatment is due to the work-related accident or whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of her prior employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

Respondent relies upon Dr. Melhorn's report dated July 19, 2001. In that report Dr. Melhorn opined claimant did have carpal tunnel which developed over a period of time with a date of onset while claimant was employed by respondent. Dr. Melhorn then noted claimant was thereafter employed with respondent for 12 months and with Farm Credit Bank for 5 months. Dr. Melhorn concluded that although it was somewhat arbitrary, he would apportion 12/17 to respondent and 5/17 to Farm Credit Bank based on a final impairment if appropriate at the end of treatment. Respondent contends this establishes claimant's condition was permanently aggravated during her subsequent employment and justifies termination of medical benefits.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the

¹K.S.A. 44-551(b)(2)(A).

²K.S.A. 44-534a(a)(2).

primary injury.³ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.⁴ Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

The Administrative Law Judge expressed some concern that Dr. Melhorn's opinion was based upon information provided by respondent's counsel and concluded Dr. Melhorn's opinion regarding apportionment was not the same as a causation opinion saying the claimant had sustained an aggravation of her condition. It must be noted that Dr. Melhorn's opinion was arbitrarily based only upon the months claimant was employed for respondent and her subsequent employer. In addition, Dr. Melhorn specifically noted his apportionment was conditioned upon whether it would be appropriate at the end of treatment.

The question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity at Farm Credit Bank aggravated, accelerated or intensified the underlying disease or affliction.⁵

The medical records proffered at the hearing do not contain any assertions that claimant's employment at Farm Credit Bank aggravated, accelerated or intensified her preexisting condition. Dr. Melhorn, in a report dated April 20, 2001, notes that after claimant began work at Farm Credit Bank her symptoms persisted even though she was performing more task rotation. A finding that symptoms persisted suggests that claimant's condition has remained the same as it was while she was employed by respondent. Absent a finding that claimant's condition has worsened it is difficult to conclude there has been a subsequent aggravation, acceleration or intensification of the underlying condition.

There is often a fine line between mere exacerbation of symptoms and an aggravation such that there would be a new accidental injury for purposes of workers compensation. Based upon the current record, the Board finds that claimant's work at Farm Credit Bank following her employment with respondent, though perhaps a factor in claimant's continued symptoms, was not an intervening injury. Her condition, therefore, is compensable as a direct and natural consequence of the original injury suffered while employed with respondent. Accordingly, respondent should remain liable for claimant's

³Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

⁴Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1084 (1996).

⁵See, Boutwell v. Domino's Pizza, 25 Kan. App. 2d 100, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

ongoing medical treatment. The Order denying respondent's request to terminate benefits should, therefore, be affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁶

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated September 20, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2002.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Douglas C. Hobbs, Attorney for Koch Industries
Vincent A. Burnett, Attorney for Farm Credit Services
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁶K.S.A. 44-534a(a)(2).